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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

TERM, 1979

No. 78-5995

TOMMY L. HUNT,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MISSOURI COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

JOHN ASHCROFT
Attorney General

PAUL ROBERT OTTO
Chief Criminal Counsel
P.O. Box 899
Jefferson City, Missouri 65102
(314) 751-3321

KRISTIE GREEN
Assistant Attorney General,
of Counsel

Attorneys for Respondent

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CITATIONS

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STATEMENT OF THE CASE

Petitioner was tried in March, 1977, in the Circuit Court of Jackson County, Missouri, on charges of kidnapping and sodomy. In the trial of this cause, petitioner filed a timely motion to quash the jury panel based on the allegation that he was denied a fair cross-section of the community in his jury panel due to the automatic exemption of women who chose to opt off jury service, contra Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), and the Sixth and Fourteenth Amendments to the United States Constitution. Evidence supporting this allegation was introduced via a stipulation regarding the statistics of Jackson County's jury wheel for the months January through June, 1976. Petitioner's motion was overruled. Verdicts of guilty were returned and petitioner was sentenced to serve two years on the kidnapping charge and five years on the sodomy charge, said sentences to run concurrently.

Subsequent to trial, petitioner filed a timely motion for new trial raising the above allegation. This motion was overruled. Petitioner's conviction was affirmed by the Missouri Court of Appeals, Kansas City District, on July 31, 1978. The motion for rehearing was overruled on August 28, 1978, and petitioner's application to transfer to the Missouri Supreme Court was denied on October 10, 1978, making the Missouri Court of Appeals' decision the final judgment in this cause. Petitioner raised the above issue on appeal, and this allegation of error was overruled by the Missouri Court of Appeals.

REASONS FOR DENYING THE WRIT

By presenting evidence on the composition of Jackson County's 1976 jury wheel but failing to do so as to the 1977 wheel, from which petitioner's jury was drawn, petitioner has failed to make a prima facie case of underrepresentation under the three-pronged test enunciated by this court in Duren v. Missouri, ____ U.S. ___, 99 S.Ct. 664, ____ L.Ed.2d ____ (January 9, 1979):

"In order to establish a prima facie violation of the fair cross-section requirement, the defendant must show: (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair, and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process." 99 S.Ct. at 668.

In the instant case, petitioner's trial was held in 1977, which meant that his jury was selected from a panel drawn from the 1977 Jackson County jury wheel. State v. Nevels, 571 S.W.2d 736, 738 (Mo.Ct.App. at K.C. 1978); Section 497.140, RSMo 1969. Thus, petitioner's reliance on 1976 statistics regarding the

Jackson County jury wheel failed to establish that the representation of women in 1977 venires was not fair and reasonable in relation to the number of women in the community.

In Duren v. Missouri, supra, in the face of statistical evidence which demonstrated that more than half of the persons in the community were female, and that the Jackson County jury venires for 1976 averaged approximately 15% female, this Court concluded that the petitioner had met the *prima facie* test, Duren v. Missouri, supra, 99 S.Ct. at 669, and consequently ruled that "such systematic exclusion of women that results in jury venires averaging less than 15% female violates the Constitution's fair-cross-section requirement". Id., 99 S.Ct. at 666. Absent statistical evidence that the 1977 Jackson County jury wheel resulted "in jury venires averaging less than 15% female" or that the proportion of women available for jury service was "not fair and reasonable in relation to the number of such persons in the community", petitioner has not met the *prima facie* test set out in Duren. Article I, Section 22B and §494.031(2), RSMo Supp. 1975, were not ruled facially unconstitutional by this court in Duren v. Missouri, supra. Hence this petition for a writ of certiorari should be denied because petitioner has failed to present evidence warranting relief. Although the Missouri Court of Appeals in its opinion in this cause at 570 S.W.2d 777 stated that the issue was not presently "an open question in Missouri" due to State v. Duren, 556 S.W.2d 11 (Mo. banc 1977), it did so "assum[ing] that appellant's contention has been preserved". Id. at 778. Petitioner's contention was clearly not preserved due to the lack of factual support for his allegation.

Further, respondent submits that the petition for the writ of certiorari should be denied because the specific issue in this cause is now before the Missouri Court of Appeals, Western District, in numerous cases (State v. Arthur Buford, No. 29658;

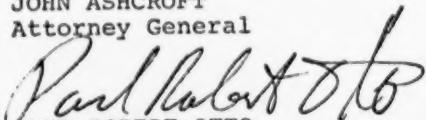
State v. Jerome R. Barnett, No. 29767; State v. Christopher D. Powell, No. 30037; State v. John Coleman, No. 30043; State v. Leonard A. Donahue, No. 30315; State v. Robert C. Mountjoy, No. 29532; State v. William J. Williamson, No. 30342). Respondent submits that the issue of preservation in cases involving venires for which no statistics were presented to the trial court is a matter of state procedure and should be decided by a Missouri forum. In several cases involving issues identical to that in this cause, the Missouri Supreme Court has denied cut-of-time applications to transfer to the Supreme Court, but has done so "without prejudice to movants' right to move for recall of the mandate and for further relief in the Missouri Court of Appeals, Western District". State v. Frank J. Clark, No. 61148, March 15, 1979; State v. Leon Nevels, No. 61043, March 15, 1979. Thus, the petitioner in this cause can move for recall of the mandate in the Missouri Court of Appeals, and the issue of preservation may be decided in light of this Court's decision in Duren. It should be noted that at the time the opinion was rendered in this cause by the Missouri Court of Appeals, Duren v. Missouri, supra, had not yet been decided by this Court, and thus the Court of Appeals was bound by the Missouri Supreme Court's decision in State v. Duren, supra. Because of the apparently controlling effect of State v. Duren, the Missouri Court of Appeals did not reach the preservation issue in this case or others like it. Respondent submits that the Missouri Court of Appeals should now do so.

CONCLUSION

WHEREFORE, respondent respectfully requests this Court to deny the petition for writ of certiorari to the Missouri Court of Appeals.

Respectfully submitted,

JOHN ASHCROFT
Attorney General



PAUL ROBERT OTTO
Chief Criminal Counsel

P.O. Box 899
Jefferson City, Missouri 65102
(314) 751-3321



KRISTIE L. GREEN
Assistant Attorney General,
of Counsel

Attorneys for Respondent